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Supreme Court, U.S.
FILED

No. 06-679

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In The

Supreme Court of the United States

ROBERT D. UTGARD,

Petitioner,

v.

STATE OF CALIFORNIA, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California
Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

ROBERT D. UTGARD
Petitioner In Pro Per
PO Box 892202
Temecula, CA
92589-2202
(951) 767-1090

QUESTIONS PRESENTED FOR REVIEW

1) Where the record verifies unemployment deprivation and due process violations and Pleadings, Briefs and Petitions, indicate Plaintiff/Petitioner is referencing "Due Process" and "Equal Protection of the Law" under 42 U.S.C. § 1983, the Fourteenth Amendment and 18 U.S.C. § 242, *Has the state court erred in determining Plaintiff/Petitioner has no constitutional claims?*

2) Where ("Claimant") assigns to the Labor Commissioner/DLSE, ten (10) claims, for unpaid wages and unfair labor practices and; eight (8) of (10) are ignored and two (2) acknowledged and represented as being addressed and; after allowing the statute of limitations to expire it is discovered no claims were ever entered into the system. Pursuant to the U.S. Supreme Court decision in *Livadas v. Victoria Bradshaw, California Labor Commissioner* (92-1920), 512 U.S. 107 (1994) that affirms unpaid wage claim assignments to the Labor Commissioner that are refused address under state law are preempted by federal law, seq., "and that redress for this unlawful refusal to enforce may be had under 42 U.S.C. § 1983. *Did the State Appellate Court err in determining that no duty exist on the part of the Labor Commissioner to address these claims and Plaintiff/Petitioner can not recover under any constitutional authority?*

3) Where the EDD, following an appeal, ignores the ALJ ruling and determination and; claimant is not provided a record of appeal and; the department generates no paperwork concerning its decision and; no information is offered concerning continuing rights and; no ALJ decisions have

QUESTIONS PRESENTED FOR REVIEW – Continued

ever denied claimant requiring Second Level Appeal; *Has the state court erred in determining "Plaintiff did not exhaust his administrative remedies"?*

4) Where, State of California, EDD Interdepartmental Claim Notes **undisputedly** verify the right to "due process" and "equal protection" has been violated; *Has the Appellate Court abused its power in ignoring the facts in order to conform its decision to the unfounded allegations of the State Defendants?*

5) Where 1,384 days have passed prior to unemployment benefits payment; *Has the state court erred in determining Plaintiff/Petitioner has no constitutional claims?*

6) Where state actors will decide or have influence on claims for unpaid wages and unfair labor practices a result of employer and union Labor Code violations and; those claims are ignored and never addressed, or are addressed in a manner greatly deviating from the law and standard agency policy and procedures and; the state actors are in a position of "Conflict of Interest"; *Has the Appellate Court erred in its decision to affirm the judgment dismissing the case?*

7) Where the Court's decision is based on Defendants misrepresentations, false accusations and distorted account of fact and; pertinent statutes supporting Plaintiffs claim or those placing liability on the state, as a matter of law, are deemed "waived," "not applicable," or "are not well taken"; *Has the Appellate Court provided Plaintiff a fair and impartial review of the facts and a decision in adherence to the protections provided within the U.S. Constitution?*

QUESTIONS PRESENTED FOR REVIEW – Continued

8) Where the facts clearly and undisputedly show the states liability and those facts are supported by written documentation, some of which is taken from Defendants own written record; *Is the continuing effort, by Defendant, to avoid accountability, by whatever means, placing a greater hardship on the Plaintiff, considered a continuation of already violated rights and an example of the Abuse of Government Power by the state?*

9) Where the negative financial stability and well being of the Plaintiff, is a direct result of acts attributable to Defendants and; as a result Plaintiff is deprived of Professional Legal Counsel and; the Pro Per status of Plaintiff and limited knowledge of law is used by Defendants and the Appellate Court to gain a negative judgment against Plaintiff; *Can be considered a Conflict of Interest? Is an example of Unfair Advantage? Is the Abuse of the Power of Government? and; Has provided the guarantees of the U.S. Constitution and its Amendments.*

PARTIES TO THE PROCEEDINGS

1) ROBERT D. UTGARD, Plaintiff and Petitioner; In Pro Per and the only aggrieved party in this action.

2) STATE OF CALIFORNIA, Defendant and Respondent; and the governing body for state agency actors.

3) (DIR) DEPARTMENT OF INDUSTRIAL RELATIONS, Defendant and Respondent; and the state agency under which the DLSE is placed.

4) (DLSE) DIV. OF LABOR STANDARDS ENFORCEMENT, Defendant and Respondent; and the state agency in which unpaid wages and unfair labor practices claims were assigned.

5) (EDD) EMPLOYMENT DEVELOPMENT DEPARTMENT, Defendant and Respondent; and the state agency responsible for the administration of the federal/state unemployment benefits program.

6) BILL LOCKYER, Attorney General of the State of California, MARSHA S. MILLER, Supervising Deputy Attorney General, PAUL C. EPSTEIN, Deputy Attorney General, States Attorneys

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

Robert D. Utgard v. State of California, DIR, DLSE, EDD

BASIS FOR SUPREME COURT JURISDICTION

The California Court of Appeal for the Fourth Appellate District, Division Three entered its judgment on July 7, 2006. Appendix A-12. Petitioner seeks review of that judgment on a writ of certiorari.

On July 23, 2006 Plaintiff/Petitioner timely filed a petition for review en banc in the Supreme Court of California. On August 16, 2006, the California Supreme Court filed an order denying the petition for review. Appendix A-13. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.1 of this court.

This court has jurisdiction under 28 U.S.C. § 1254(1) to review on writ of certiorari the judgment of a state court of appeals.

CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment XIV, Due Process and Equal Protection Clause

STATEMENT OF THE CASE

This petition seeks to remedy the abuse of power at the hands of, State of California, agencies (DIR) Department of Industrial Relations, (DLSE) Division of Labor Standards Enforcement and the (EDD) Employment Development Department, for their tortuous acts depriving a working man of rights, protections, and privileges guaranteed every American in the U.S. Constitution and its Amendments.

(EDD) Beginning in 2000 following temporary project closure Petitioner filed for unemployment benefits. After completing the normal preliminary paperwork and; having undergone an additional telephone interview and received a written potential weekly award, the first check was expected anytime on the day the disqualification arrived. Without ever being advised a potential eligibility problem may exist and never told the former employer was disputing the claim. The disqualification, for what was represented as leaving last assignment for no good reason and having misrepresented facts in order to obtain benefits, the evidence, was represented furnished by the employer.

Now accused and convicted without ever being given an opportunity to rebut the employer's statements and disqualified to receive any benefit payments, Petitioner was instructed to file an appeal and forward it to the department for processing. Filed in March 2000 it took about six (6) weeks before the appeal hearing was held in mid April. At the hearings conclusion the Administrative Law Judge was visibly disturbed and remarked, it was obvious this claim was not properly investigated before sending it to appeal. Indicating this was a course of events happening more frequently he eluded, in order to send a

message to the EDD, he was considering sending the claim back to the department with instructions to investigate this time.

Although called for in the unemployment insurance codes Petitioner never received a written record of the decision and any recommendations. When 70 days had passed since appeal and no information had been received concerning that appeal, a phone call was made to the EDD for clarification. Following a quick review of the file the representative stipulated she could see the ALJ remand following the appeal and then after a short pause said, "you did not receive any paperwork because the department has determined you remain disqualified. After inquiring just how this was possible when an appeal was just held, she instructed, if you do not agree, file an appeal. Told to go ahead and initiate the appeal right now, she remarked that it was required in writing but before it could be filed would require Petitioner first be sent a disqualifying determination with which to reference the appeal. Although now known to be a mandatory duty, Petitioner did not receive any information from the EDD and none was sent from the Board of Appeals.

After discovering, on line, an address in Sacramento described as a point with which to file any yet resolved unemployment claim, a draft, four (4) pages in length was prepared and sent to the address indicated. That appeal, at that time the second, was never answered or acknowledged. In 2003 following discovery that the statute on unemployment claims was four (4) years, a third appeal request was forwarded to the EDD explaining all that had taken place. In October 2003 a new First Level Appeal took place and the disqualification was overturned. A record of the proceedings was requested. When they arrived among

the many papers were EDD memos and interdepartmental claim notes. The memos indi ated that the appeals board was requesting files from the EDD and the EDD was indicating none were available as they had been destroyed. The claim notes however contained a full accounting as to what was taking place at the EDD in 2000 with Petitioners claim, making clear what had taken place. There was an entry indicating the ALJ remand of the claim that indicated, based on testimony, an investigation was warranted and ("Claimant") would be contacted to determine last employer. Included but under separate entry was noted that ("Claimant") is now FS eligible. The next entry, thirty days following appeal, identified the fact the department was aware of claimant's honesty at filing and indicated so by reference. Sixty days after appeal it is noted that the department recognized it had erred and written documents, required, were not sent to claimant.

(DLSE) When a four (4) year association ended with the employer and the union that employment required membership, collectively they had violated nearly the entire Master Labor Agreement and union by-laws. They were each in violation of both state and federal law. Petitioner was owed wages and agreed to subsistence, withheld illegally, and the number of unfair labor practices was at least double digit. Several attempts both verbally and in writing were made so these issues could be resolved. When all were ignored Petitioner requested the assistance of the State of California, Labor Commissioner and the division he heads up known as the Division of Labor Standards Enforcement. The DLSE is a division of California's Department of Industrial Relations.

Over the course of more than a year a total of ten (10) claims were sent to the DIR and DLSE requesting intervention to resolve issues of unpaid wages and unfair labor practices. Eight (8) of ten (10) were completely ignored and two (2) were acknowledged. The first acknowledgement was from the Chief Deputy Labor Commissioner who indicated on two (2) separate occasions he would check the status and promptly reply. When he disappeared and facing a statute limitation, claim number seven (7) was forwarded to the Long Beach DLSE Office. The Long beach Deputy replied immediately and indicated the claim was forwarded to its Santa Ana office for investigation. Over the course of the next four (4) months an additional three (3) claims were sent to Santa Ana along with correspondence.

One week following the expiration of statute limitations Petitioner received the first contact from the Santa Ana Deputy investigating the claim. He was calling to inform that unless other individuals experiencing the same problems and still employed were available he was going to have to close this claim due to the statute of limitations. He additionally apologized because he could not understand why the claim was never entered into the system. In reality he had no need to close the file as no file had ever been opened as represented. As a matter of fact other correspondence confirms Petitioners name could not be found in the system. Due to these intentionally negligent acts the property interest owed is lost forever.

STATE COURT PROCEEDINGS

ARGUMENT

A) THE COURT OF APPEALS DECISION IS NOT BASED ON FACTUAL INFORMATION

The Appellate Court states, "Plaintiff did not exhaust his administrative remedies, there is no mandatory duty for either of the defendants to perform the acts plaintiff alleges, defendants are not liable for negligence per se, and plaintiff cannot recover under any constitutional claims. Therefore we affirm the judgment.

ADMINISTRATIVE REMEDIES

CA CODE CIV. PROC., § 1094.5; see CA UI CODE § 410.

CA UI CODE § 410 states, "A decision of the appeals is final, except for such action as may be taken by a judicial tribunal as permitted or required by law. A decision is . . . binding on the director with respect to the parties involved in the particular appeal.

When the claim was remanded to the EDD following the first appeal it ignored the ALJ decision that set aside its disqualification. Although it did learn the truth later, it ignored the request to properly investigate the claim. It produced no paperwork, provided no continuing rights and just as if no appeal had taken place it arbitrarily invoked its own decision that the disqualification was unchanged. According to statute the only guilty party here is the EDD Director.

In its decision the Appellate Court made several statements; "Plaintiff did not exhaust his administrative remedies," Plaintiff was required to file an appeal. "Plaintiff

did not do that. Instead he filed this action seeking to recover the benefits denied and for related damages." "The fact he suffered the alleged damages is based on his own failure to act."

Not one of the statements above is factual and there is no basis other than the allegations of the Defendant that could make them true. Petitioner had no reason to file a Second Level Appeal because each appeal was a First Level and both where in favor of the Petitioner. When Petitioner filed this action, he had already received his unemployment benefits nearly one (1) year prior.

The court agreed the verbal indication by telephone in June 2000 to ("Claimant") that the department's decision leaving him disqualified would remain in affect satisfies the requirement of notification. There is no basis in UI Law that indicates a verbal communication will meet the requirement notification. There are two (2) however that indicates it shall be in writing, the first is referenced below.

CA UI § 408 states; "All decisions and orders of the Appeals Board **shall** be in writing." The following federal code and regulations demonstrate in their language what Petitioner did not receive:

42 U.S.C. § 503(a)(1) (state law must include "methods of administration as are found by the Secretary of Labor to be reasonably calculated to insure full payment of benefits *when due.*") (emphasis added).

42 U.S.C. § 503(a)(3) (states must provide for "a fair and impartial tribunal, for all individuals whose claims for unemployment compensation are denied . . . ") (emphasis added).

The Appellate Court indicated in its decision that 503(a)(1) & (3), "are not well taken."

20 C.F.R. § 602 (interpreting the "when due" and "fair hearing" clauses, the regulations set forth quality control standards for the program).

20 C.F.R. § 640 (interpreting the "when due" clause by establishing promptness standards for interstate and intrastate claims processing).

20 C.F.R. § 650 (interpreting the "when due" and "fair hearing" clauses by establishing appeal promptness standards).

Defendants have not provided the court a shred of evidence to support its unfounded allegation that ("Claimant") had any administrative remedies in need of being exhausted. The fact that a legal determination affirming a dismissal was made by the court without any evidence is irresponsible and a continuing violation of Petitioners right to equal protection.

B) THE COURT OF APPEALS OPINIONS ARE IN CONFLICT WITH DECISIONS OF ITS OWN CALIFORNIA SUPREME COURT

GOVERNMENT CODE § 815.6 Second in the Court of Appeals list of reasons for affirming the judgment of dismissal is, "There is no mandatory duty for either of the defendants to perform the acts plaintiff alleges." Based on Government Code 815.6 that dictates the liability of a public entity for its failure to discharge its statutory duty unless it establishes reasonable diligence was taken to discharge that duty. The Appellate Courts decision in this matter is contrary to and in direct conflict with the

position taken by the California Supreme Court concerning the language of the law and how it directs;

"The California Supreme Court has clearly and unequivocally stated numerous times, *California Correctional Peace Officers Assn. v. State Personnel Board,* 10 Cal. 4th 1133, 43 Cal.Rptr.2d 693 (1995), that the word "shall," as opposed to "may," creates an obligatory, nondiscretionary duty to act as the statute directs. There is no discretion to do otherwise." Additionally (24) of the (29) codes that set forth law in California indicate "shall" is mandatory and "may" is permissive.

EMPLOYMENT DEVELOPMENT DEPARTMENT

CA UI CODE § 1329 reads, "the department **shall** promptly notify each of the claimant's base period employers of the computation **after** the payment of the first weekly benefit." Obviously a means with which the Legislature intended to protect and provide the "due process" concerns of claimant's and at the same time conform to the necessary federal statutes and regulations concerning "due process" and unemployment.

The Defendant alleged it is obligatory to notify the employers but not so concerning the first benefit payment. Had the legislature not intended the payment of first benefit it would not have been included in the statute.

CA UI CODE § 1334 indicates parties to the appeal **shall** be promptly notified in writing, of the ALJ decision and reasons, following appeal.

CA UI CODE § 408 states; "All decisions and orders of the Appeals Board **shall** be in writing."

The Appellate Court took the position, even if there was a mandatory duty to send written notice, "which we do not decide." There was no need for the Appellate Court to decide as the legislature had already made that decision.

CA UI CODE § 1335 states, If an appeal is filed, with respect to the period prior to the final decision on the appeal payment **shall** be paid only after the decision, except that; **(c)** If benefits . . . or an administrative law judge issues a decision allowing benefits, the benefits **shall** be promptly paid regardless of any appeal, and regardless of any action taken by the appeals board. . . .

Petitioner was erroneously disqualified to receive benefits. When the ALJ remanded the claim, he set aside the disqualification determination. Section 1335(c) is met by the ALJ decision that set aside the disqualification thereby making the ("Claimant") not disqualified and eligible to receive benefits.

According to § 1329 the EDD had a mandatory duty to ("Claimant") to pay at least the first benefit prior to the employer being notified of the award.

According to § 1334 the Appeals Board had a mandatory duty to ("Claimant") to promptly provide a written account of the appeal decision and the reason it was reached.

According to § 1335 the EDD had a mandatory duty to ("Claimant") to pay benefits when their bad decision disqualification was tossed out by the ALJ.

DIVISION OF LABOR STANDARDS ENFORCEMENT

LABOR CODE § 96 sets forth that the Labor Commissioner or DLSE, **shall**, upon presentation by ("Claimant") take assignment of claim for unpaid wages and unfair labor practices for investigation as to the validity.

In agreeing that **CA LABOR CODE § 96** does provide for the assignment of claims for wages and unfair labor practices, the court states that, "no time requirements are included" and to that Petitioner has and will stipulate. No timeline exists in § 96.

The court then states a very important fact of concern to this case with; "As plaintiff alleged, the DIR untimely did act on his claim when it denied it." The court stipulates the action on the claim was untimely and denied. Given the intent of the Legislature was to see that wage claims are addressed timely, the actions of the DLSE and its officers in ignoring the claim of Petitioner would not be in the spirit of the following;

CA LAB CODE § 59 indicates the mandatory duty for the DIR to;. . . . "through its appropriate officers **shall** administer and enforce all laws imposing any duty, power, or function upon the offices, officers or officers of the department."

Although never actually denied orally or in writing the claim was denied by ignoring its existence and non placement within the system. As will be discussed later a refusal to act on a claim by the Labor Commissioner is actionable according to the U.S. Supreme Court. Further an indication of the Appellate Courts desire to conform its decision is the following; "We realize there are many

demands on the office of the DIR and we are in no position to micromanage its operations. It is not for us to set out a time period within which the DIR must act when the Legislature has not seen fit to do so." Not two (2) paragraphs later the court recognizes the Legislature has set forth a time frame by referencing from the following;

Labor Code § 98(a) " . . . "Within 30 days of filing of the complaint, the Labor Commissioner **shall** notify the parties as to whether a hearing will be held, or whether action will be taken in accordance with Section 98.3, or whether no further action will be taken on the complaint."

The statute does not say may notify claimant, nor does it say can notify, or might, could, possibly, or if he feels like it. What it does say, as the Legislature intended, in an obligatory sense, is after allowing 30 days within which to determine if the claim, assigned by § 96, has merits, the Labor Commissioner shall put forth in writing to the parties what further action will or will not be taken.

In stating, "however, it has no mandatory duty to do so but instead has discretion to do nothing," the Appellate Court sided with the Defendant that indicates, the state's Labor Commissioner is under no mandatory duty to enforce labor law.

It is alleged instead that enforcement is deemed to be at the discretion of the Labor Commissioner and at his will.

Petitioner argues was this fact and the enforcement of law discretionary on the part of the Labor Commissioner he would be at liberty to choose which individuals benefit from his position as the top Labor Law Enforcement Official in the state. Under certain circumstances

this might be construed a Conflict of Interest where the Labor Commissioner has a long standing business relationship with the entity named in the claim assignment to the DLSE for investigation.

Walt Rankin & Associates, Inc. v. City of Murrieta, 84 Cal.App. 4th 764 (2000). Decided within the same district but another division that court unlike the court in this case eloquently and very thoroughly discussed Gov. Code § 815.6 and how statutes may be viewed and read to form a relationship that will make clearer the Legislature's intent in the language forming a statute.

Plaintiff states that § 96 provides an avenue for employees who may have no other recourse a means by which to, if due, use the State Labor Law Enforcement Officers to collect his property interest. Other evidence supporting this is found in the following:

DLSE POLICIES AND PROCEDURES FOR WAGE CLAIM PROCESSING: Herein references claim time table, "Within thirty (30) days of the filing of the complaint, the deputy shall notify the parties as to the specific action which will initially be taken regarding the claim."

DLSE DETERMINATION LETTER: On February 19, 2002, Chief Council for the DLSE, Miles Locker, wrote in a departmental determination letter that "Under state law, all employees have the right to have their wage claims heard and decided by the Labor Commissioner."

ATTORNEY GENERAL OFFICIAL REPORTS: The opinion letter of the AG, dated October 10, 2000, indicates in reference to LAB CODE § 96, "which requires the Labor Commissioner to take assignments of claims for loss of wages."

C) THE COURT OF APPEALS OPINIONS AND DECISION ARE IN CONFLICT WITH PREVIOUS DECISIONS OF THE UNITED STATES SUPREME COURT

NO RECOVERY UNDER ANY CONSTITUTIONAL CLAIMS

Were the duties of the Labor Commissioner at will and he could decide which claims were addressed and which were not, under the Constitution, this would violate the equal protection clause, and that is actionable under

42 U.S.C. § 1983 and is applicable to the states under the Fourteenth Amendment to the U.S. Constitution.

In *Livadas v. Bradshaw* (92 1920), 512 U.S. 107 (1994) the court stated seq., and that redress for this unlawful refusal to enforce may be had under 42 U.S.C. § 1983.

In *Livadas,* the Labor Commissioner refused in writing to address claim filing because of claimant's union association. In our action no written refusal was made, the claim was just simply ignored. Since the action here ignoring the claim was deliberate, it shall also be considered a violation of;

18 U.S.C. § 242 Is the willful deprivation of rights under color of law.

CA. CIV. CODE § 52.3(a). Is the equivalent to the federal statute above, committed by law enforcement. Not only is a violation of CIV. CODE § 52.3(a) actionable under the U.S. Constitution it also breaches the State of California's veil of protection behind which it hides. Now exposed it is a statute of law identifying the states liability as a

violation of the guaranteed rights of the **CALIFORNIA CONSTITUTION Article I Section 7(a).**

Defendant alleges CIV CODE § 52.3 is misplaced because the statute applies only to "a pattern and practice of conduct by law enforcement officers. . . . " As previously indicated above, the Labor Commissioner is the ranking Labor Law Enforcement Officer in the state. His position is sworn requiring an oath of office and he is vested with the powers of arrest.

CA LABOR CODE 95(a)(b)(c)(d) all reference the police power of DLSE Investigators and **(d)** specifically states, "all officers and employees designated by the Labor Commissioner as investigators, shall have the authority of peace officers to make arrests, and may serve processes and notices . . . "

DLSE Investigators are designated Labor Law Enforcement Officers and as such CIV. CODE § 52.3 is not misplaced and as a matter of law is relevant to the case before the court.

The State Appellate Court in its decision affirming a judgment of dismissal states, "plaintiff cannot recover under any constitutional claims." Never mentioning or taking into account the provisions of CIV. CODE § 52.3 or the Fourteenth Amendment and only referencing 42 U.S.C. § 1983, the Appellate Court affirms its decision with the following;

(*Javor v. Taggart,* 98 Cal.App. 4th 795, 807 (2002).) bars a claim of due process against the state Constitution claim. Indicating only the reference of section 1983 to "persons" shall be liable allegedly defeats a U.S. Constitution claim cited with *Will v. Michigan Department of State Police,* 491

U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), holding that for the purpose of this statute a state is not a person.

The Appellate Court states the following, "As to other liability under the federal Constitution, we do not understand plaintiff's argument about the statute of limitations and consider it waived." (*People v. Stanley,* 10 Cal. 4th 764, 793 (1995) [claim must be supported by reasoned legal argument].)

The Appellate Court is aware and knows perfectly well that the Fourteenth Amendment places the state in a position of having to answer for their tortuous actions against the constitutional rights and protections of the Petitioner. The Appellate Courts reference to statute of limitations refers to ("Claimant's") explanation establishing the fact this case for some actions now six years old did not culminate and identify the constitutional claims until much later and within a time frame allowing a 42 U.S.C. § 1983 and Fourteenth Amendment Constitutional claim.

The Constitution guarantees that the government can not take away a person's basic rights to life, liberty or property, without due process of law. In order to survive the test the process due must involve a liberty or property interest. It is well established in law that unemployment benefits and earned wages are each protected property interest that must be provided when due. The State of California understands the principles of and importance in providing claimants due process which is described in the following.

UBDG UNEMPLOYMENT BENEFITS DETERMINATION GUIDE: Described as an eight-volume compendium to provide a reference for EDD claims agents, the (BDG)

has devoted an entire chapter to Due Process that explains what is due and why.

Preface-PR20 Due Process

(a) Requirement of "State Action"

(b) Government Agency's Exercise of Power

Available for viewing on-line and referenced within the Due Process section is http://www.edd.ca.gov/uibdg/upr20.htm

California Department of Human Resources Development v. JAVA, 402 U.S. 121 (1971). Decided by the U.S. Supreme Court *JAVA* states, Section 303(a)(1) of the Social Security Act requires a method of administration "reasonably calculated to insure full payment of unemployment compensation when due." In light of the intent of Congress to make payments available at the earliest stage of unemployment as is administratively feasible, in order to provide a substitute for wages, the language "when due" must be construed to mean when benefits are allowed as a result of a hearing of which both parties have notice and at which they are permitted to present their respective positions.

Throughout the course of these proceedings Petitioner has included reference to *JAVA* in every pleading, answer and review request, because it represents the courts position concerning the relationship of unemployment benefits, due process and fair and equal justice under the law. With *JAVA* the high court invalidated the EDD practice of stopping benefit payments whenever an employer appealed the EDD benefit award. The Defendant declared *JAVA* to be inapposite to the case before the

court. Given the U. S. Supreme Courts opinion referenced above and the fact this is verbatim what took place in this case, Defendants statement has no supportable point of law.

This raises the question of how is it the Appellate Court is able to review and make a determination such as has been done and can honestly consider the rights, liberties and protections the constitution affords every American has been administered correctly, fairly and according to the law? How can it state Petitioner has no constitutional claim entitlements?

D) THE COURT OF APPEALS RULES, RELEVANT STATUTES SUPPORTING PETITIONER'S CASE NOT APPLICABLE

STATUTES REJECTED BY THE COURT AS OUT OF HAND

The Appellate Court stated the following concerning certain Labor Codes used by the Petitioner; "We reject out of hand plaintiff's citation to **LABOR CODE § 59, 96.7, 1195, 1195.5** and **1197** as not applicable to his complaint."

CA LAB CODE § 59: Indicates the mandatory duty for the DIR to; . . . "through its appropriate officers **shall** administer and enforce all laws imposing any duty, power, or function upon the offices, officers or officers of the department."

CA LAB CODE § 96.7: Identifies the Legislature has already given the Labor Commissioner the power to collect on claims found valid and *may* without any other authority collect what's due the employee. The Commissioners actions are then set forth in an obligatory manner with;

(a) He **shall** act as the trustee for the worker, **(b)** He **shall** find those individuals that are owed, **(c)** Any funds collected **shall** be remitted to the worker or legal representative. Here the Defendant alleges because it say's may the entire statute is not obligatory. Plaintiff/Petitioner's states, the Legislature has already bestowed the power to collect on claims and the opening statement is merely the setup for the mandatory actions that follow. The Appellate Court rejects this claim indicating it, "not applicable to his complaint." Which brings into play, if the Legislature did not intend to investigate claims; and for those found legitimate to collect, why bother to have any statutes?

CA LAB CODE § 1195: Identifies claims for a payment of a lower wage than that fixed by the Industrial Welfare Commission assigned to the DLSE; "The Division **shall** investigate the matter and take all proceedings necessary to enforce the payment of a wage not less than the minimum wage." The court alleges this statute and the two following "are not applicable to his complaint." The Defendants indicate the three pertain to the minimum wage so they do not apply. In reality they apply to wage order standards requiring payment of the prescribed amount. Formerly in wage order class # 4 Petitioners class is now in #16.

CA LAB CODE § 1195.5: Identifies claims for a payment of a wage that exceeds that fixed by the Industrial Welfare Commission assigned to the DLSE; "The Division shall enforce the payment of any sums found, upon examination, to be due and unpaid to the employee." Petitioner's wages exceeded the fixed rate because of increased subsistence allotment.

CA LAB CODE § 1197: Identifies, "the minimum wage for employees fixed by the Industrial Welfare Commission is the minimum wage to be paid to an employee, and the payment of a less wage than the minimum so fixed is unlawful. The court disallows this statute and the Defendant alleges it does not apply. Plaintiff indicates taking his pay is unlawful.

E) THE COURT OF APPEAL RULES DEFENDANTS ARE NOT LIABLE FOR NEGLIGENCE PER SE

EVIDENCE CODE § 669 Negligence as a Matter of Law

Like § 815.6, in order to prove a claim for Negligence Per Se claimant must be able to show a statute was violated, the law violated must have been enacted to protect a certain group or class of individual. The individual making the claim must be from that class and the violation itself must be the proximate cause of the loss being claimed.

The Appellate Court takes the position that neither the DLSE nor EDD may be held liable for actions under this statute.

Simply put, if a person does not do its job to uphold and protect the rights of the individual for whom a particular statute is written to protect and in doing so that individual is harmed in a manner the statute was enacted to prevent, that person is held liable as having been negligent as a matter of law.

As a member of the labor workforce in California there is no doubt the Petitioner is within the category of individuals the labor and unemployment statutes were enacted to protect. There is no doubt these laws were

enacted to prevent Petitioners loss of wages and exposure to unfair practices at work. There is also no doubt the Legislature intended that, if eligible, Plaintiff should not be subjected to the erroneous deprivation of unemployment benefits. Additionally adding to the detrimental actions aimed at the Petitioner is the misleading information of agency officers on which Petitioner relied and due to that reliance a protected property interest was lost. Due to that loss and the others a part of this action Petitioners standard of living, income earning potential, personal property, business associations, personal relationships and any quality of life, is either lost or negatively impacted.

Hiding behind its veil of protection that indicates the state is not liable for negligent actions of its government actors, § 669(a) just says if you are negligent, in a specific manner, with a specific outcome, the specifics of this statute will hold you responsible as having been negligent as a matter of law. Since the language states "a person" and California uses that also as a means to hide behind the Legislature included **EVIDENCE CODE § 175** "Person" includes a natural person and . . . or public entity.

State of California v. Superior Court (Perry), 150 Cal.App. 3d 848, 197 Cal.Rptr. 914 (1984). Section II[7] discusses how the state is deemed negligent. "[W]hen the state, through its agents, voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member, thereby inducing reliance, it is held to the same standard of care as a private person or organization" (Id. at p.24). "In common parlance, the assumption of a duty by the public entity and detrimental reliance thereon by a citizen create a "special relationship" between the public entity and the citizen sufficient to impose a duty of due care on the public

entity." (*Williams, supra*, p. at 25; see *Davidson v. City of Westminster, supra*, 32 Cal. 3d at pp. 202-203).

Other California Court Cases weighing in on the subject of negligence or government immunity had the following to say.

Muskopf v. Corning Hospital District, 55 Cal. 2d 211 (1961). The court stated, we must begin with the well-settled notion that in government tort cases "the rule is liability, immunity is the exception."

Johnson v. State of California, 69 Cal. 2d 782, 798 (2002). The court stated, "Accordingly courts should not casually decree governmental immunity. Unless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail."

Bradford v. State of California, 36 Cal.App. 3d 16 (1973). This argument completely overlooks the Legislative Committee comment to section 815; "In general, the statutes imposing liability are cumulative in nature, i.e., if liability cannot [36 Cal.App. 3d 21] be established under the requirements of one section, liability will nevertheless exist if liability can be established under the provisions of another section." (italics added)

CONCLUSION

Americans take comfort in knowing that, unlike some third world dictatorships, its democratic system of government has provided programs of financial aid to assist during times of need. Workers are secure knowing there are laws that provide protections for earned wages and workers rights. Citizens need not worry about justice, our government provides a court system and judicial review that insures everyone has his day in court and eventually truth will have the opportunity to prevail. Our failsafe is the guarantees of the Constitution.

Here the system failed miserably, recognized some failures and yet continued its tortuous actions into the courts. There is no doubt Petitioners right to due process was violated and there is no doubt that none of it was done with concern for the right to equal protection of law. The actions of state agencies deprived the Petitioner of unemployment entitlements for a period of nearly four (4) years and were the direct cause for the loss of unpaid wages and subsistence allotments.

In spite of the other many state and federal statute violations that the California Courts simply dismissed as not applicable they flatly refused to acknowledge the statutes brought under the U.S. Constitution and the Fourteenth Amendment. Petitioner's original complaint and First Amended complaint each had cause of actions for "Due Process." The First Amended complaint indicated it was brought under 42 U.S.C. 1983 and the Fourteenth Amendment and answers to demurrer indicated these facts also. After the court sustained demurrer and disallowed any Constitutional claim Petitioner continued to include them within the text of the court record. There is no doubt the

Defendant and the courts each knew the action was for due process and equal protection clause violations and yet it continued as though these did not exist and the claim was for non payment of unemployment benefits. The Court of Appeals cover sheet is a testament to this fact. The State of California violated Petitioner's rights guaranteed under the Constitution and the state courts allowed the violation to continue in spite of federal law brought to their attention.

This isn't the American Dream, it is the California nightmare that just won't end. For 23 years Petitioner protected the homes, businesses, families and forests in the State of California. It is sad knowing that anywhere else in the world where Petitioner never saved a home, never saved a life and never fought a fire, would show more compassion, care and goodwill, than the state to which he gave.

Petitioner's last resort for justice is in the hands of the U.S. Supreme Court who may, due to time constraints, deny the petition for review and that is an uneasy feeling. At 58 years old when you have lost everything at the hands of government and do not have a lifetime ahead of you to recover, you can only pray for justice and hope it comes in time.

Petitioner respectfully submits this writ as a truthful account of facts and prays for the courts intervention and review.

Respectfully submitted,

ROBERT D. UTGARD
Petitioner In Pro Per
PO Box 892202
Temecula, CA 92589-2202
(951) 767-1090

2006 WL 1555814

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROBERT D. UTGARD, Plaintiff and Appellant, v. EMPLOYMENT DEVELOPMENT DEPARTMENT et al., Defendants and Respondents.	G035811 (Super. Ct. No. 04CC09382) OPINION (Filed Jun. 7, 2006)

Appeal from a judgment of the Superior Court of Orange County, Gregory Munoz, Judge. Affirmed.

Robert D. Utgard, in pro. per., for Plaintiff and Appellant.

Bill Lockyer, Attorney General, James M. Humes, Chief Assistant Attorney General, James M. Schiavenza, Assistant Attorney General, Marsha S. Miller and Paul C.

Epstein, Deputy Attorneys General, for Defendants and Respondents.

* * *

Plaintiff Robert D. Utgard appeals from a judgment entered after the court sustained a demurrer to his second amended complaint without leave to amend. Plaintiff sued the Employment Development Department (EDD) for damages arising out of denial of his unemployment benefits and the Department of Industrial Relations (DIR) for failure to act on a claim for nonpayment of wages and unfair labor practices. (The Division of Labor Standards Enforcement is part of the DIR, not a separate entity. Therefore, we treat any claims involving the former as against the DIR.) Plaintiff did not exhaust his administrative remedies, there is no mandatory duty for either of the defendants to perform the acts plaintiff alleges, defendants are not liable for negligence per se, and plaintiff cannot recover under any constitutional claims. Therefore we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On appeal from a judgment after a demurrer is sustained without leave to amend, we assume the truth of all facts properly pleaded and any inferences arising from them. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) This assumption, however, does not apply to conclusions of law or fact, deductions, or contentions. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

Plaintiff alleges he filed for unemployment benefits in February 2000. In March he received a notice that benefits were denied because, based on information from his

former employer, he had quit and made false statements to obtain benefits. After the hearing on plaintiff's appeal, the administrative law judge stated he was remanding the case back to the EDD for further investigation. The EDD thereafter affirmed its decision to deny benefits.

In 2003 plaintiff began filing complaints with the Labor Commissioner and the DIR for unpaid wages and unfair labor practices in violation of the Labor Code. He alleges most of these were never answered.

Plaintiff's first amended complaint contained causes of action labeled "due process," "negligence," and "misfeasance." (Capitalization omitted.) The court sustained a demurrer without leave to amend as to all causes of action except negligence and gave plaintiff 10 days to amend that count.

The second amended complaint contains two causes of action. The first, for "failure to discharge a statutory duty" (capitalization, underscoring and bold omitted), is premised on Government Code section 815.6, which provides that a public entity is liable for harm caused by failure to discharge a mandatory duty. The second cause of action, for negligence per se, relies on Evidence Code section 669 which sets out a presumption for a failure to exercise care if certain elements are met.

As to defendant EDD, plaintiff relies on three Unemployment Insurance Code provisions concerning his claim for unemployment benefits with which the EDD allegedly did not comply. As to defendant DIR, plaintiff cites two Labor Code sections it allegedly breached after he filed a complaint for unfair labor practices.

Plaintiff seeks general and a variety of special damages on both causes of action, including unemployment benefits, loss of wages, personal property and income, damage to his credit, loss of the ability to seek restitution from his employers, and costs. He also requests that the state investigate the manner in which its agencies operate. The court sustained the demurrer to the second amended complaint without leave to amend. Additional facts are set out in the discussion.

DISCUSSION

1. Introduction

Although unclear, it appears plaintiff is appealing from the sustaining of the demurrer to the two causes of action in the second amended complaint and the causes of action for denial of due process in the first amended complaint. We confine our opinion to those claims.

Before plaintiff may sue governmental entities, he is required to file a claim and have it rejected (Gov. Code, §§ 945.4, 912.4) and plead this fact (*State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1239). This is not alleged in the second amended complaint. However, plaintiff did plead these facts in the first amended complaint. Although the second amended complaint superseded the first amended complaint (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 941, p. 399), we take judicial notice of that allegation so that we may decide plaintiff's appeal on the merits. However, we are unpersuaded by plaintiff's contention that the rejection of his claim, describing it as "Tort claim for Complex Issues, General/Punitive Damages," was a relinquishment by defendants of their immunity against punitive damages.

2. Denial of Unemployment Insurance Benefits

Plaintiff is suing the EDD for damages under both causes of action arising from the consequences of its denial of unemployment insurance benefits, e.g., two evictions, loss of personal belongings, income, and business liability insurance, and an adversely affected credit rating. The essence of his grievances is that after he filed his claim, he received a notice of an award, what he calls being "pre-approved." (Bold omitted.) Subsequently, his benefits were denied. After an administrative law judge remanded the claim back to the EDD, it failed to change its decision to deny benefits. This does not state a claim under either cause of action.

Plaintiff's remedy at that point was to file an appeal with the appeals board. (Unemp. Ins. Code, §§ 1334, 1336.) Had he not prevailed at that hearing, he would have had the right to file an action for administrative mandamus in the superior court. (Code Civ. Proc., § 1094.5; see Unemp. Ins. Code, § 410 [decision of appeals board final "except for such action as may be taken by a judicial tribunal as permitted or required by law"].) However, before filing an action in the superior court, he was required to first exhaust his administrative remedy, i.e., filing an appeal with the board. (*Gantner & Mattern Co. v. California Employment Commission* (1941) 17 Cal.2d 314, 317.)

Plaintiff did not do that. Instead he filed this action seeking to recover the benefits denied and for related damages. Similar conduct was proscribed in *Du Four v. Unemployment Ins. Appeals Bd.* (1975) 49 Cal.App.3d 863, 866, 868 [adverse opinion of referee may not be challenged in superior court; appeal to appeals board required first].) Thus, any challenge to the denial of

benefits under plaintiff's claim under both theories of negligence per se and failure to discharge a statutory duty is barred due to plaintiff's failure to exhaust his administrative remedies. The fact that he suffered the alleged damages is based on his own failure to act.

Plaintiff pleads that the EDD violated Unemployment Insurance Code sections 1329, 1334, and 1335, all allegedly containing mandatory duties, the violation of which gives him the right to bring this action under Government Code section 815.6. The latter section "'"contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not a discretionary, duty . . . ; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability . . . ; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered." [Citation.] Whether an enactment is intended to impose a mandatory duty is a question of law for the court.' [Citation.]" (*County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 638-639.) None of the three Unemployment Code sections supports plaintiff's complaint.

Unemployment Insurance Code section 1329 states that when a new claim is filed, the EDD shall make a computation "set[ting] forth the maximum amount of benefits potentially payable" for the year and per week and notify the claimant of the amounts. In addition, the EDD must notify the employers "after the payment of the first weekly benefit." Contrary to plaintiff's allegation, this did not require the EDD to pay him the first week's benefits once he filed the claim. It merely requires notification once a payment is made.

Likewise, Unemployment Insurance Code section 1335 creates no mandatory duty applicable here. It provides that if an appeal is filed, benefits for a period before the final decision shall not be paid during the pendency of the appeal except in three specified instances: (a) the EDD has ordered payments "irrespective of any decision on the issues set forth in the appeal"; (b) an administrative law judge has affirmed a decision allowing benefits; or (c) the EDD or an administrative law judge has decided benefits are due. None of these scenarios is present here.

Plaintiff alleges that his claim was "pre-approved, then changed to a disqualification." (Bold omitted.) Although nothing further is alleged, presumably plaintiff is relying on the "Notice of Unemployment Insurance Award" (bold and capitalization omitted) attached as an exhibit to the first amended complaint. He apparently alleges that this was a decision by the EDD that benefits were due and thus under section 1335 should have been paid during the appeal. However, the notice was not a "pre-approval." It was the computation of the claim required under Unemployment Insurance Code section 1329, described above. Further, the administrative law judge never decided benefits were due plaintiff; he merely sent the claim back for further investigation. Thus, there was no duty to pay benefits during the pendency of the appeal.

Finally, plaintiff relies on Unemployment Insurance Code section 1334, which provides that after an administrative law judge has made a decision, the claimant "shall be promptly notified in writing. . . . " Plaintiff alleges he was never notified of the outcome. However, he also alleges that after the hearing, the administrative law judge remanded the matter back to the EDD for further investigation.

Thus, although there was no written notice, plaintiff did receive actual notice of the decision. Even if there was a mandatory duty to send written notice, which we do not decide, breach of that duty would not have proximately caused any damage to plaintiff. Plaintiff had notice of the decision denying his claim and could have acted on it by filing an appeal with the board. Therefore, one of the essential elements of Government Code section 815.6 has not been met, and the claim fails to state a cause of action.

If plaintiff is challenging lack of written notice from the EDD, Unemployment Insurance Code section 1334 does not require such notice. Thus, this allegation would also fail to state a claim for breach of a mandatory duty.

Nor do these acts or failures to act qualify as negligence per se. Government Code section 815.6 sets out the general rule of liability. (Cal. Law Revision Com. com., 32 West's Ann. Gov. Code (1995 ed.) foll. § 815.6, p. 210.) However, there are more specific statutes that provide government immunity. Government Code section 815, subdivision (a) states that "[e]xcept as otherwise provided by statute . . . [¶] . . . [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." "This section abolishes all common law or judicially declared forms of liability for public entities. . . . " (Legis. Com. com. – Sen., 32 West's Ann. Gov. Code (1995 ed.) foll. § 815, p. 167.) "Since all government tort liability is dependent upon the existence of an authorizing statute, a public entity's duty created by statute must be identified by plaintiff." (*Foster v. County of San Luis Obispo* (1993) 14 Cal.App.4th 668, 672.) Other than the Unemployment Insurance Code sections discussed above, plaintiff has not identified any applicable authorizing

statute. His references to Civil Code section 1428, Government Code section 270, and section 303(a) of the Social Security Act (42 U.S.C. § 503(a)) are not well taken. Thus there is no basis for a claim of negligence per se.

3. Claims Against Department of Industrial Relations

Beginning in April 2003, plaintiff sent 10 "complaints," almost all of which were in the form of letters and e-mails, to the Labor Commissioner and various offices of the DIR setting out claims of unpaid wages and unfair labor practices. He alleges all but two of them were ignored. In January 2004 he was told his claim had never been entered into the system and the statute of limitations had passed; thus his claim would be closed.

In his cause of action for failure to discharge a mandatory duty, plaintiff relies on two Labor Code sections. Section 96 provides that the Labor Commissioner shall take assignments of, among other things, wage claims, claims for damages for misrepresentation of employment conditions, and claims for penalties of nonpayment of wages. Section 98 states that the Labor Commissioner shall have the authority to investigate employee complaints.

Plaintiff alleges both of these sections required the Labor Commissioner to investigate his claims. However, the language of these sections does not support his claim. Section 98 gives the commissioner the authority, not the duty, to do so. (Lab. Code, § 98, subd. (a).) Section 96 does not deal with investigations at all.

Section 96 does provide that the DIR shall take assignment of wage claims, claims for penalties for

nonpayment of wages, and claims for damages due to "misrepresentations of conditions of employment." (Lab. Code, § 96, subds. (a), (d), (f).) However, nothing in this section requires that it act on them within a certain time period. As plaintiff alleged, the DIR ultimately did act on his claim when it denied it. We realize there are many demands on the office of the DIR and we are in no position to micromanage its operations. It is not for us to set out a time period within which the DIR must act when the Legislature has not seen fit to do so.

Plaintiff also alleges Labor Code section 98 and the "Policies and Procedures Manual for Wage Claims" (bold omitted) require the DIR to notify him within 30 days of action taken. As to the manual, which was neither attached nor quoted, we are not required to assume the truth of plaintiff's conclusions about its contents or meaning. (*Moore v. Regents of University of California, supra,* 51 Cal.3d at p. 125.)

Labor Code section 98 states, "The Labor Commissioner may provide for a hearing in any action to recover wages, penalties, and other demands for compensation properly before the division or the Labor Commissioner . . . and shall determine all matters arising under his or her jurisdiction. . . . Within 30 days of filing of the complaint, the Labor Commissioner shall notify the parties as to whether a hearing will be held, or whether action will be taken in accordance with Section 98.3, or whether no further action will be taken on the complaint." (Lab. Code, § 98, subd. (a).)

Even assuming this language makes it mandatory that notice be given within 30 days, which we do not decide, breach of that duty would not have proximately

caused any damage to plaintiff. Plaintiff complains he was damaged because the DIR did not proceed with the action. However, it has no mandatory duty to do so but instead has discretion to do nothing.

We reject out of hand plaintiff's citation to Labor Code sections 59, 96.7, 1195, 1195.5, and 1197 as not applicable to his complaint.

The gist of the negligence per se cause of action against the DIR is the failure to answer or act upon most of his complaints and claims. The principles of negligence per se are set out above. As with the cause of action against the EDD, plaintiff must set out an authorizing statute setting out the basis of the alleged liability. (*Foster v. County of San Luis Obispo, supra,* 14 Cal.App.4th at p. 672.) Here, plaintiff relies on Labor Code section 98, alleging that it "imposed upon the [DIR] . . . a standard of care and duty to perform in a certain manner following the filing of a claim."

One element of a cause of action for negligence per se is that the violation of the statute proximately caused the injury. (Evid. Code, § 669, subd. (a)(2).) The DIR's alleged failure to act on plaintiff's claim or to give notice within 30 days is not the cause of his alleged injury. As with the first cause of action, plaintiff complains he was injured because the DIR did not process the complaint. However, under Labor Code section 98, the DIR had no duty to act on plaintiff's complaint.

4. Constitutional Claims

In his first amended complaint, plaintiff alleged defendants' acts and omissions violated his due process

rights, and in his brief plaintiff relies on the due process and equal protection clauses of the state and federal constitutions and a federal civil rights claim (42 U.S.C. § 1983 (section 1983)). However, "[i]t is beyond question that a plaintiff is not entitled to damages for a violation of the due process clause or the equal protection clause of the state Constitution. [Citations.]" (*Javor v. Taggart* (2002) 98 Cal.App.4th 795, 807.) Further, section 1983 provides that "persons" shall be liable for specified acts. *Will v. Michigan Department of State Police* (1989) 491 U.S. 58, 71 [109 S.Ct. 2304, 105 L.Ed.2d 45] holds that for purposes of this statute a state is not a person.

As to other liability under the federal Constitution, we do not understand plaintiff's argument about the statute of limitations and consider it waived. (*People v. Stanley* (1995) 10 Cal. 4th 764, 793 [claim must be supported by reasoned legal argument].) We are unpersuaded by plaintiff's arguments that the Attorney General has a conflict of interest.

5. No Leave to Amend

We also reject plaintiff's claim the court erred by sustaining the complaint without leave to amend. On appeal, plaintiff has the burden to show "there is a reasonable possibility the defect in the pleading can be cured by amendment. [Citation.] '" . . . Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. . . . " [Citation.]' [Citation.]" (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 7-8.) Here, plaintiff has not made such a showing. He merely argues the court erred in sustaining the demurrer in the first place. Our

review of the complaint leads to the conclusion plaintiff could not successfully amend to state a cause of action.

Any other arguments raised by plaintiff and not specifically addressed in this opinion are deemed waived for failure to properly brief them. (*People v. Stanley, supra,* 10 Cal.4th at p. 793.)

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

RYLAARSDAM, ACTING P.J.

WE CONCUR:

ARONSON, J.

FYBEL, J.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

ROBERT D. UTGARD Plaintiff, v. STATE OF CALIFORNIA, et al., Defendants.	CASE NO. 04CC09382 **ORDER OF DISMISSAL [~~PROPOSED~~]** (Filed May 6, 2005) Assigned to Judge Gregory Munoz Department C56 Date Action Filed: September 13, 2004 Demurring Party: Defendant State of California (acting by and through the Department of Employment Development Responding Party: Plaintiff Robert D. Utgard

The court, on March 30, 2005, having sustained the demurrer of Defendant State of California (acting by and through the Employment Development Department) to the second amended complaint without leave to amend, this action is ordered dismissed in its entirety with prejudice.

DATED: 5/6/05 /s/ Gregory Munoz
Judge of The Superior Court
HON. GREGORY MUNOZ

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

Robert Utgard
P.O. Box 892202
Temecula, CA 92589-2202

G035811

ROBERT D. UTGARD,
Plaintiff and Appellant,

v.

EMPLOYMENT DEVELOPMENT DEPARTMENT et al.,
Defendant and Respondent.

Sup. Ct. No. 04CC09382

---

* * REMITTITUR * *

I, Stephen M. Kelly, Clerk/Administrator of the Court of Appeal of the State of California, for the Fourth Appellate District, Division III, do hereby certify that the decision entered in the above-entitled cause on June 7, 2006 has now become final.

___ Appellant ✓ Respondent to recover costs
___ Each party to bear own costs
___ Costs are not awarded in this proceeding
___ See decision for costs determination

Witness my hand and the Seal of the Court affixed at my office this August 21, 2006.

Stephen M. Kelly
Clerk/Administrator
By: /s/ Lee Kegley
Deputy Clerk

cc: All Counsel (copy of remittitur only, Cal. Rules of Court, Rule 26(d).)

App. 17

Court of Appeal, Fourth Appellate District,
Div. 3 – No. G035811
S145011

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ROBERT D. UTGARD, Plaintiff and Appellant,

v.

EMPLOYMENT DEVELOPMENT DEPARTMENT et al.,
Defendants and Respondents.

(Filed Aug. 16, 2006)

Petition for review DENIED.

/s/ GEORGE
Chief Justice

POLICIES AND PROCEDURES FOR WAGE CLAIM PROCESSING

INTRODUCTION

The purpose of this pamphlet is to provide a basic overview of the Division of Labor Standards Enforcement's (DLSE) wage claim process and to outline the basic filing, conference, hearing and appeal procedures. Since this guide is not meant to be a definitive statement regarding the processing of wage claims, parties are strongly urged to *read all forms* received by them throughout the process. *Failure to comply with each requirement of the process may result in the loss of important rights.*

SUMMARY OF THE PROCEDURES

Any employee who has a claim against his or her employer or former employer for unpaid wages or other compensation, which falls under the jurisdiction of the Labor Commissioner, may file a claim with DLSE which is under the direction of the State Labor Commissioner. The Labor Commissioner has no jurisdiction over those persons determined to be bona fide independent contractors and only limited jurisdiction over employees of public agencies (for example, federal, state, county or municipal employees). In addition, based on California law and court decisions, the Labor Commissioner, in some cases, does not have jurisdiction over the wage claims of union members working under collective bargaining agreements.

The Labor Commissioner, pursuant to the provisions of Labor Code Sections 98 and 98.3, has established procedures for investigating wage complaints, which may include either a conference pursuant to Section 98.3 or a hearing pursuant to Section 98(a), or both.

Sometimes claims are filed which are very complex and involve a large number of employees and records. Such claims will usually be investigated by DLSE's Bureau of Field Enforcement and not through the procedures described in this pamphlet. If this occurs, the parties will be so informed by the deputy handling the case. However, the majority of claims filed with DLSE are resolved through Section 98.3 conferences and/or Section 98(a) hearings that are explained in this pamphlet.

FILING THE COMPLAINT

An employee (plaintiff) alleging the non-payment of wages or other compensation by his or her employer (defendant), must file a claim with a local office of DLSE to initiate investigation of the claim by the Labor Commissioner. The statute of limitations on claims is either two (2), three (3) or four (4) years from the date of the alleged non-payment, depending on the underlying employment agreement or the type of claim. Plaintiffs are advised to file a claim as soon as possible after the alleged non-payment.

When filing the claim, the plaintiff should provide as much information and documentation as possible, including the legal name, location and status (method of doing business, i.e. sole proprietorship, partnership, corporation) of the defendant.

After the claim is assigned to a Deputy Labor Commissioner (deputy), he or she will determine, based on the circumstances of the claim, how best to proceed. **Within thirty (30) days of the filing of the complaint, the deputy shall notify the parties as to the specific action which will initially be taken regarding the claim:**

- referral to a conference
- referral to a hearing
- **dismissal of the claim**

Not all cases will go to a conference before going to a hearing. Moreover, many cases will be resolved informally before either a conference or a hearing is scheduled.

THE CONFERENCE

- If the decision has been made by the deputy to hold a conference, a Notice of Claim Filed and Conference will be sent to both parties which will describe the claim, provide the date, time and place of the conference, and will direct the parties that they

* * *

—Original Message—

—Original Message—
From: Miles Locker
Sent: Tuesday, February 19, 2002 4:56 PM
To: 'ver-@compasscares.com'
Cc: DIRInfo
Subject FW: Legal Question Regarding Arbitration Agreements

It is possible that you misunderstood the information given by what you describe as "the local DIR office." DIR – the Department of Industrial Relations – is made up of several divisions, including the Division of Labor Standards Enforcement ("DLSE", also known as the Office of the State Labor Commissioner). In answering this question, I will assume you are referring to DLSE, as we are the agency that adjudicates wage claims filed by employees against employers.

You state that your company's arbitration "agreement" meets the requirements of Armendariz v. Foundation Health Psychcare Services, Inc. Whether or not that is true is, of course, a legal question that can only be answered by the courts. Suffice it to say that I have seen a number of arbitration "agreements" which courts have held to be unconscionable and therefore unenforceable, despite employer assertions that those "agreements" met the requirements of Armendariz.

DLSE's position with regard to compulsory arbitration "agreements" is very simple – **under state law, all employees have the right to have their wage claims heard and decided by the Labor Commissioner**. If an employer wishes to use an arbitration "agreement" to prevent an employee from having his or her wage claim processed by the Labor Commissioner, that employer is

welcome to file a petition to compel arbitration with the appropriate superior court. DLSE will not decline to act on a wage claim where the dispute is purportedly covered by an arbitration "agreement" absent a court order granting a petition to compel arbitration. Thus, DLSE will not halt proceedings on a wage claim in response to an employer's assertion that the claim is covered by an arbitration "agreement".

Moreover, as a general matter, in cases where we believe the arbitration "agreement" does not cover the wage dispute, or does not meet the standards enunciated in Armendariz, or where the papers in support of the petition to compel arbitration fail to establish the facts necessary to trigger FAA preemption, or where we believe the employer has waived the right to arbitrate, DLSE will intervene in opposition to the petition to compel arbitration. In the one year following the US Supreme Court's decision in *Circuit City v. Adams* (holding that arbitration "agreements" that are part of an employment agreement are covered by the Federal Arbitration Act, except for agreements related to employees engaged in transporting goods or persons across state lines), DLSE has been successful in the majority of cases in which we intervened to oppose petitions to compel arbitration.

With the recent US Supreme Court decision in EEOC v. Waffle House (holding that an arbitration "agreement" between an employer and employee does not preclude a government agency with independent enforcement powers from maintaining a court action against an employer for "victim-specific remedies), **DLSE will not hesitate to use its investigative and prosecutorial authority under Labor Code Section 98.3 to file lawsuits against employers for wages and penalties owed to**

workers who may be unable to file such actions in their own names. DLSE, like the EEOC, is not bound by any arbitration "agreements."

Finally, you ask whether the California district court of appeal decision in *Lagatree v. Luce, Forward, Hamilton & Scripps*, still stands. In that case, decided in September 1999 (eleven months prior to the state Supreme Court decision in Armenddariz), the court of appeal held that a worker who has no dispute pending can be fired (and an applicant can be denied employment) for refusing to sign an arbitration "agreement." (This explains why I put quotations around the word "agreement.") The

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OFFICE OF THE ATTORNEY GENERAL
State of California

BILL LOCKYER
Attorney General

OPINION	:	No. 00-303
of	:	October 10, 2000
BILL LOCKYER Attorney General	:	
ROBERT L. MUKAI Deputy Attorney General	:	

THE HONORABLE RICHARD K. RAINEY, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

Did the recent amendment of Labor Code section 96, which requires the Labor Commissioner to take assignments of claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during non-working hours, abrogate existing law that permits the disciplining of peace officers for off-duty conduct occurring away from their place of employment that is otherwise lawful but conflicts with their duties as peace officers?

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